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FEB 10 2011
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. JAMES LEWANDOWSKI, Petitioner.	)	2 CA-CR 2010-0327-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20071116

Honorable Michael J. Cruikshank, Judge

REVIEW GRANTED; RELIEF DENIED

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E C K E R S T R O M, Judge.

¶1 Petitioner James Lewandowski seeks review of the trial court's order dismissing his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P., in which he alleged ineffective assistance of counsel. "We will not disturb a trial

court's ruling on a petition for post-conviction relief absent a clear abuse of discretion." *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Lewandowski has not sustained his burden of establishing such abuse here.

¶2 In 2007, a jury found Lewandowski guilty of possession of methamphetamine, possession of cocaine base, and possession of drug paraphernalia. Lewandowski appealed and this court affirmed his convictions and sentences, *State v. Lewandowski*, No. 2 CA-CR 2008-0057 (memorandum decision filed Mar. 31, 2009), but in a separate published opinion vacated the criminal restitution order the trial court had entered. *State v. Lewandowski*, 220 Ariz. 531, ¶ 15, 207 P.3d 784, 789 (App. 2009).

¶3 Lewandowski subsequently initiated proceedings pursuant to Rule 32, alleging in his petition that trial counsel had been ineffective in two regards. First, he argued that by failing to advise him of the expiration date of a plea offered by the state, counsel had deprived him of the "opportunity to enter into a favorable plea." Second, he alleged that counsel had been ineffective in failing to file a motion in limine to preclude evidence that he had invoked his right to remain silent. He claimed this failure, together with counsel's lack of preparation, contributed to the prosecutor's misconduct at trial, which consisted of a comment during the opening statement on Lewandowski's exercise of his right to remain silent. The trial court summarily denied relief, concluding Lewandowski had failed to establish either that counsel's performance had been deficient or that he had been prejudiced by any purported error. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984).

¶4 In his petition for review filed in this court, Lewandowski argues he was entitled to a hearing on his first claim because the trial court committed legal error in "focus[ing] on [his] rejection of the plea until days before the trial" as the basis for a finding that he had not been prejudiced by counsel's deficient performance. "A defendant is entitled to an evidentiary hearing when he presents a colorable claim, that is a claim which, if defendant's allegations are true, might have changed the outcome." *State v. Watton*, 164 Ariz. 323, 328, 793 P.2d 80, 85 (1990). To prevail upon a claim of ineffective assistance of counsel, a petitioner must show both that "counsel's performance was deficient" and that "the deficient performance prejudiced the defense." *Strickland*, 466 U.S. at 687; *accord State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985).

¶5 Reurging many of the arguments he made below, Lewandowski maintains counsel was ineffective in failing to tell him when the plea offer would expire. Pointing to his belated attempt to accept the plea before trial and his assertion in his affidavit that he "would have entered into [the] plea agreement at an earlier date" if he had been told of the expiration date, he claims he presented sufficient evidence to establish prejudice and warrant a hearing. *See State v. Runningeagle*, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993) (colorable claim entitling petitioner to hearing exists when allegations of petition, if true, might have changed outcome). Even accepting Lewandowski's averment as true,[1]

[1]In *State v. Donald*, 198 Ariz. 406, ¶¶ 20-23, 10 P.3d 1193, 1201 (App. 2000), Division One of this court concluded Donald had shown prejudice through his sworn statements that he would have accepted a plea offer had counsel adequately advised him. This was so despite "other evidence in the record" that contradicted Donald's claim. *Id.*

however, we agree with the trial court that Lewandowski failed to establish that "[c]ounsel's performance was deficient."

¶6 Lewandowski asserts that "[t]o be effective during the plea negotiation phase of a trial case, counsel needs to provide" information about "[h]ow much time a defendant has to evaluate the pros and cons of entering into a plea before the offer is revoked." But, the authority he cites in support of that assertion does not support it. Rather, that authority establishes that defense counsel is required to notify a defendant promptly of a plea offer and to explain the offer to him or her in such a way as "to permit the defendant to make a reasonably informed decision whether to accept or reject a plea offer." *State v. Donald*, 198 Ariz. 406, ¶ 9, 10 P.3d 1193, 1198 (App. 2000). And, as the trial court pointed out, Lewandowski averred counsel had advised him of the terms of the plea offer and had told him "it was a favorable plea," but he nevertheless had rejected it because he "believed [he] had a good trial case." Thus, counsel properly provided Lewandowski with the information he needed to determine whether to accept the state's plea offer. Lewandowski has not cited any authority to support his proposition that more was required.

¶7 Furthermore, even accepting arguendo that failure to notify a defendant of the expiration date of a plea offer can be deficient performance, we cannot say Lewandowski has established ineffective assistance under the circumstances here. Although Lewandowski did not specify exactly when he had changed his mind about the

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¶ 23. The court stated that such other evidence "at most suggest[s] factual disputes that should be resolved by the trial court after a hearing." *Id.*

plea offer, he averred that when he had "realized that [he] could not hire [his] own attorney" he had decided to accept it. Counsel stated, however, that he did not recall Lewandowski "express[ing] any interest in a plea," apparently until the week before trial,[2] at which point the prosecutor informed defense counsel that the plea had been withdrawn due to "office policy." But Lewandowski has not directed us to anything in the record suggesting defense counsel was or should have been aware of the prosecutor's office policy or of the fact that a deadline to accept the plea offer existed. In fact, it appears counsel was unaware of the policy or that the plea offer would expire. When counsel informed the court at a status conference that he had attempted to accept the plea, but had been informed by the prosecutor it was too late, he stated, "I don't understand. But that's what [the prosecutor] said." In sum, we agree with the trial court that Lewandowski has not made a colorable claim of deficient performance.

¶8 We next address Lewandowski's claim that counsel was ineffective in either failing to file a motion in limine to preclude evidence that he had invoked his right to remain silent or to prepare adequately for trial so as to have known the details of Lewandowski's invocation. Lewandowski apparently maintains that counsel's failures allowed the prosecutor to commit misconduct by telling the jury in his opening statement that Lewandowski had been "obstinate and unwilling to cooperate in [his] interview" with a police detective.

[2]Lewandowski averred that he had known "much earlier than the week before trial that [he] wanted to accept the . . . plea" offer, but he did not state he had ever informed counsel of that desire.

¶9 Lewandowski's counsel did not object when the prosecutor made the comment about his invocation, but later objected to a question asked of one of the interviewing officers and argued that evidence of Lewandowski's invoking his right to remain silent should be excluded. During a bench conference on the objection, the trial court pointed out that such issues are "usually best dealt with in a pretrial motion," and chastised defense counsel for having failed to do so because of the subsequent confusion created. But the court ultimately precluded the evidence. On appeal, this court determined that the prosecutor's statement had been improper, but that Lewandowski had failed to show the prejudice required to obtain reversal under fundamental error review. *Lewandowski*, No. 2 CA-CR 2008-0057, ¶¶ 17, 19-20.

¶10 In denying Lewandowski relief on his petition for post-conviction relief, the trial court did not address whether counsel's performance had been deficient, but concluded Lewandowski had not established prejudice. *See State v. Salazar*, 146 Ariz. 540, 541, 707 P.2d 944, 945 (1985) (if defendant makes insufficient showing on one part of *Strickland* test, court need not address other part). Specifically, the court stated he had not shown that "but for Counsel's failure to file a pre-trial motion and adequately prepare for trial, the jury verdicts would have been different."

¶11 Lewandowski argues that the trial court's ruling conflated the standard applied in the context of fundamental error review with that applied in the Rule 32 context. In determining whether an error is fundamental, we assess whether a defendant has shown that a reasonable jury could have reached a different conclusion absent the error. *State v. Henderson*, 210 Ariz. 561, ¶¶ 26-28, 115 P.3d 601, 608-09 (2005). In the

Rule 32 context, however, the defendant must establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

¶12 We agree with Lewandowski that the trial court misstated the standard to be applied in determining prejudice in the Rule 32 context. It misquoted *State v. Ramirez*, 126 Ariz. 464, 467, 616 P.2d 924, 927 (App. 1980), in setting forth the standard, stating that the petitioner must show "the outcome of the case would have been different" instead of that the petitioner must show the result "would probably have been different." It repeated its use of this "would have" standard later in its ruling as well.

¶13 But the court also "decline[d] to conclude that the prosecutor's isolated reference to the inadmissible evidence in his opening statement had an effect on the jury's deliberations," and noted the substantial other evidence presented against Lewandowski, suggesting it implicitly had concluded the defendant had not shown a reasonable probability existed that the result would have been different absent the error. In essence, the trial court found the error had no effect on the jury whatsoever—a sufficient finding to reject Lewandowski's claim under any prejudice standard.

¶14 Thus, despite the trial court's wording error, we agree with its conclusion that Lewandowski failed to establish prejudice. As the court pointed out, there was substantial evidence against Lewandowski and the jury was instructed that it should not consider the prosecutor's statements as the basis for its verdicts. We also note Lewandowski has not established a reasonable probability that the prosecutor would not have made the statement had defense counsel moved in limine or otherwise been more

prepared. The statement was improper even absent a pretrial motion and, as Lewandowski himself pointed out, is an "egregious" and "commonly known error," which the prosecutor should have known to avoid even in the absence of a motion to preclude.

¶15 Finally, we decline to address Lewandowski's apparent argument, raised for the first time in his petition for review, that counsel was ineffective in failing to object timely to the statement, thereby forfeiting all but fundamental error review. This court will not consider for the first time on review issues that have been neither presented to, nor ruled on by, the trial court. *Ramirez*, 126 Ariz. at 468, 616 P.2d at 928; *see also* Ariz. R. Crim. P. 32.9(c)(1)(ii) (petition for review shall contain "[t]he issues which were decided by the trial court and which the defendant wishes to present" for review). Thus, although we grant Lewandowski's petition for review, we deny relief.

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge